

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PAUL HUPP,

Plaintiff,

CASE NO. 12cv0492-GPC-RBB

ORDER:

1. DENYING PLAINTIFF'S MOTION TO STRIKE EXPERT WITNESS CHRISTOPHER J. ELLIS

[Dkt. No. 198]

2. GRANTING PLAINTIFF'S MOTION TO STRIKE "EXHIBIT 2" TO THE DECLARATION OF RAYMOND WETZEL IN SUPPORT OF DEFENDANTS CITY OF SAN DIEGO AND RAYMOND WETZEL'S MOTION FOR SUMMARY JUDGMENT

[Dkt. No. 211]

3. VACATING MOTION HEARING

SAN DIEGO COUNTY, et al.

Defendants.

Before the Court are two motions to strike filed by Plaintiff Paul Huff ("Plaintiff"). Plaintiff seeks to strike an expert report and evidence put forth by Defendant City of San Diego ("Defendant") and Defendant Raymond Wetzel (collectively, "Defendants"). (Dkt. Nos. 198, 211.) Pursuant to Local Civil Rule 7.1(d)(1), the Court find the motions suitable for adjudication without oral argument.

1 For the reasons set forth below, the Court **DENIES** Plaintiff's motion to strike
2 Defendant City of San Diego's expert witness Christopher J. Ellis, (Dkt. No. 198), and
3 **GRANTS** Plaintiff's motion to strike "Exhibit 2" to the Declaration of Raymond
4 Wetzel submitted in support of Defendants City of San Diego and Raymond Wetzel's
5 Motion for Summary Judgment, (Dkt. No. 211).

6 **BACKGROUND**

7 **I. Motion to Strike Expert Report**

8 On October 16, 2013, Plaintiff Paul Hupp ("Plaintiff") filed an ex parte
9 motion to strike City of San Diego Expert Witness Christopher Ellis from testifying
10 at trial. (Dkt. No. 175.) Plaintiff seeks exclusion of Ellis' testimony as a discovery
11 sanction for Defendant's failure to provide timely expert testimony disclosures in
12 accordance with Federal Rule of Civil Procedure 26(a). (Dkt. Nos. 175, 198.) On
13 October 31, 2013, the Court denied without prejudice Plaintiff's ex parte motion on
14 the ground that Plaintiff failed to offer evidentiary support for his motion and failed
15 to file a copy of the report for the Court's review. (Dkt. No. 190.) The Court
16 directed Plaintiff to contact the Court to schedule a hearing date to allow full
17 briefing, in compliance with the Civil Local Rules, should Plaintiff seek to file a
18 renewed motion to strike. (*Id.*) On November 13, 2013, the Court docketed
19 Plaintiff's renewed motion to strike expert witness Christopher Ellis nunc pro tunc
20 to November 8, 2013. The parties have fully briefed the motion. (Dkt. Nos. 217,
21 218.)

22 **II. Motion to Strike Exhibit 2 to the Declaration of Raymond Wetzel**

23 On December 6, 2013, Defendant City of San Diego and Defendant Raymond
24 Wetzel filed a motion for summary judgment as to Plaintiff's Third Amended
25 Complaint. (Dkt. No. 204.) In support of the motion, Defendants submitted a
26 declaration executed by Defendant Wetzel on December 4, 2013, attaching three
27 exhibits. (Dkt. No. 204-5.) Wetzel authenticates as "Exhibit 2" to his declaration "a
28 petition written by Plaintiff in June 2010 to the United States Court of Appeal for

1 the Ninth Circuit." (Id. at 4.) On December 13, 2013, Plaintiff filed a motion to
2 strike "Exhibit 2" to the Declaration of Raymond Wetzel. (Dkt. No. 211.)
3 Defendants have not filed an opposition to Plaintiff's motion.

4 **DISCUSSION**

5 **I. Motion to Strike Expert Report**

6 Plaintiff seeks to strike the expert report and testimony of Christopher Ellis
7 ("Ellis") for Defendant's alleged failure to comply with Fed. R. Civ. P. 26. (Dkt.
8 No. 198-1.) Plaintiff argues Defendant City of San Diego has failed to comply with
9 procedural rules regarding the disclosure of expert testimony. First, Plaintiff argues
10 Defendant failed to give a complete statement of all opinions Ellis will express and
11 the basis for the opinions as required under Rule 26(a)(2)(B)(I). (Id. at 2.) Plaintiff
12 argues Ellis' expert statement is conclusory, and that he has failed to provide factual
13 support for his expert opinion. (Id.) Second, Plaintiff argues Defendant failed to
14 provide a list of all other cases in which Ellis has testified as required under Rule
15 26(a)(2)(B)(v). (Id.) Finally, Plaintiff argues Defendant failed to provide a statement
16 of the compensation to be paid under Rule 26(a)(2)(B)(vi), and that the "consultant
17 fee" Ellis has provided in his report is insufficient. (Id.)

18 In opposition, Defendant responds that Ellis was properly disclosed as an
19 expert witness and that Ellis' report complied with the Rule 26(a)(2)(B)
20 requirements of providing: (i) the basis of and reasons for Ellis' opinions; (ii) the
21 documents Ellis reviewed in forming his opinions; (iii) an extensive list of Ellis'
22 qualifications; and (iv) Ellis' fee schedule. (Dkt. No. 217 at 2) (quoting Fed. R. Civ.
23 P. 26(a)(2)(B)). Defendant concedes neglecting to disclose a list of cases in which
24 Ellis has testified as an expert in the past four years, Fed. R. Civ. P. 26(a)(2)(B)(v),
25 explaining that the failure was inadvertent. (Id. at 2.) Defendant has now filed a list
26 of two cases in which Ellis has testified as an expert in the past four years as part of
27 the Declaration of Christopher J. Ellis in support of Defendant's opposition to
28 Plaintiff's motion to strike Ellis' expert report. (Dkt. No. 217-1.) Defendant further

1 claims the initial failure to disclose this information was harmless; that Plaintiff
2 failed to meet and confer in good faith as required by Federal Rule of Civil
3 Procedure 37; and that Plaintiff should have filed a motion to compel the disclosure
4 rather than a motion to strike the expert report in its entirety. (Id. at 3.)

5 Pursuant to Fed. Civ. R. P. 37(c) this Court has discretion to exclude evidence
6 that is not submitted in accordance with Rule 26(a). The rule states in relevant part:
7 “If a party fails to provide information or identify a witness as required by Rule
8 26(a) or (e), the party is not allowed to use that information or witness to supply
9 evidence on a motion, at a hearing, or at a trial, unless the failure was substantially
10 justified or is harmless.” Fed. R. Civ. P. 37(c). Courts have upheld the use of Rule
11 37(c) sanctions even when the sanction precludes a litigant’s entire cause of action
12 or defense. Ortiz-Lopez v. Sociedad Espanola de Auxilio Muto Y Beneficiencia de
13 Puerto Rico, 248 F.3d 29, 35 (1st Cir. 2001) (although the exclusion of an expert
14 prevented plaintiff from making out a case and was “a harsh sanction to be sure,” it
15 was “nevertheless within the wide latitude of” Rule 37(c)(1)).

16 However, the U.S. Court of Appeals for the Ninth Circuit has recognized that
17 “[t]wo express exceptions ameliorate the harshness of Rule 37(c)(1): The
18 information may be introduced if the parties’ failure to disclose the required
19 information is substantially justified or harmless.” Yeti by Molly, Ltd. v. Deckers
20 Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001) (citing Fed. R. Civ. P.
21 37(c)(1)). The Court finds that all three disclosure failures complained of by
22 Plaintiff fall under the “harmless” exception to Rule 37(c) sanctions. First, upon
23 review of Ellis’ expert statement, the Court disagrees with Plaintiff’s contention that
24 Ellis failed to provide any factual support for his expert opinion. Ellis’ report
25 explains his expertise, lists the sources of information relied on, details a lengthy
26 summary of events considered, and reviews applicable law and policies before
27 stating Ellis’ opinion. (Dkt. No. 217-2, Ex. 1.) The Court finds that Defendant has
28 met the Rule 26(a)(2)(B)(i) requirement of providing the basis of and reasons for

1 Ellis' opinions. Plaintiff provides no legal support for his claims to the contrary.
2 (Dkt. No. 198-1 at 2.)

3 Second, the Court finds that Defendant's failure to provide a list of cases in
4 which Ellis has testified in the past four years did not prejudice Plaintiff and in any
5 case has now been cured. Defendant has therefore met its burden of showing that
6 the failure to disclose was harmless. See Yeti by Molly, Ltd., 259 F.3d at 1107
7 ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to
8 prove harmlessness."). Plaintiff has not offered any argument or evidence to support
9 a finding that he has been harmed by Defendant's inadvertent failure to disclose.

10 Last, Plaintiff argues Defendant failed initially to provide a statement of the
11 compensation to be paid to Ellis, (Dkt. No. 198-1 at 2), and that this defect has not
12 been cured, (Dkt. No. 218 at 3). The Court disagrees. Defendant provided a detailed
13 "fee schedule" with Defendant's initial disclosure of Ellis' expert report. The fee
14 schedule states Ellis' charges for court appearances, depositions, meetings, research,
15 written reports, document/tape review, and travel expenses. (Dkt. No. 217-2, Ex. 1
16 at 3.) The Court finds that Defendant's provided fee schedule meets the Rule
17 26(a)(2)(B)(vi) expert testimony disclosure requirement of providing "a statement
18 of the compensation to be paid for the study and testimony in the case." Should
19 Plaintiff desire more specificity, Plaintiff may meet and confer with Defendant or
20 file a motion to compel additional disclosure. The Court declines to sanction
21 Defendant by striking the report in its entirety based on failure to meet Rule
22 26(a)(2)(B) requirements. Accordingly, the Court DENIES Plaintiff's motion to
23 strike the expert report of Christopher J. Ellis.

24 **II. Motion to Strike Exhibit 2 to the Declaration of Raymond Wetzel**

25 In addition, Plaintiff has filed a motion to strike "Exhibit 2" to the
26 Declaration of Raymond Wetzel, filed in support of Defendants' motion for
27 summary judgment, (Dkt. No. 204-5). (Dkt. No. 211.) Plaintiff argues that the
28 exhibit is not relevant to any cause of action or defense in the above-captioned

1 matter. Defendants have not filed an opposition. Upon review of the Exhibit, the
2 Court finds the content irrelevant to Defendants' motion for summary judgment.
3 Accordingly, the Court GRANTS Plaintiff's motion to strike "Exhibit 2" of the
4 Declaration of Raymond Wetzel, (Dkt. No. 204-5), submitted in support of
5 Defendants' motion for summary judgment. See Civ. L. R. 7.1(f)(3)(c) (stating that
6 failure to oppose a motion "may constitute a consent to the granting of a motion or
7 other request for ruling by the court").

8 **CONCLUSION AND ORDER**

9 For the foregoing reasons, the Court hereby:

10 1. **DENIES** Plaintiff's motion to strike the expert testimony of Christopher J.
11 Ellis, (Dkt. No. 198); and

12 2. **GRANTS** Plaintiff's motion to strike "Exhibit 2" to the Declaration of
13 Raymond Wetzel, submitted in support of Defendants City of San Diego and
14 Raymond Wetzel's Motion for Summary Judgment, (Dkt. No. 204-5). (Dkt.
15 No. 211.)

16 3. The motion hearing set to hear both motions for January 31, 2014 at 1:30
17 p.m. is hereby VACATED.

18 **IT IS SO ORDERED.**

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20 DATED: January 30, 2014

21 
22 HON. GONZALO P. CURIEL
23 United States District Judge
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